

## Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629

Application 014/2015, *Jibu Amir Mussa & Another v United Republic of Tanzania*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicants were convicted and sentenced to thirty (30) years imprisonment for armed robbery. The Applicants claimed the sentence was “improper” and that they were denied the right to free legal assistance and not informed of their right to legal representation. The Court held that the Applicants were convicted and sentenced based on legislation which was in force when the crime was committed. However, the Court held that the failure to provide the Applicants with free legal assistance and failure to inform them of their right to free legal representation violated the Charter.

**Jurisdiction** (material jurisdiction, 18)

**Admissibility** (exhaustion of local remedies, constitutional petition, 35, 36; issues first raised before the Court, 37; submission within reasonable time, 49-51)

**Fair trial** (legality, 67; free legal assistance, 77-79)

**Reparations** (moral damages, 94, 95)

Separate Opinion: Bensaoula

Dissenting opinion: BENSAOULA

**Admissibility** (exhaustion of local remedies, 18; submission within reasonable time, 23)

### I. The Parties

1. Jibu Amir alias Mussa and Saidi Ally alias Mangaya (hereinafter referred to as “the Applicants”) are nationals of the United Republic of Tanzania, who are currently serving thirty (30) years’ prison sentence each, at the Ukonga Central Prison ,Dar es Salaam, having been convicted of the offence of armed robbery.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as “the Respondent State”), which became a Party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the

Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs.

## **II. Subject matter of the Application**

### **A. Facts of the matter**

3. The record before this Court indicates that on 31 December 2001, at 7 pm, the Applicants jointly with others not before this Court stole an amount of twelve thousand Tanzanian Shillings (TZS 12,000) from one, Frank Munishi, at his shop. During the robbery, one of the Applicants, that is, Jibu Amir shot Frank Munishi and his wife Gladiness Munishi with a pistol as the victims tried to flee from the scene of the crime. Frank Munishi was further stabbed by the other Applicant – Saidi Ally, with a “bush knife” to coerce him into giving the Applicants the money which he subsequently did, following which, the Applicants left the crime scene. Thereafter, neighbours of the victims converged at the crime scene and rushed the victims to Temeke Police Station and subsequently to the hospital.
4. Three (3) of the Prosecution Witnesses, that is, PW1, PW2 and PW3 testified before the District Court of Temeke, Dar es Salaam that they were at the scene of the robbery. Furthermore, PW1 testified that he served the Applicants on the material day of the crime while PW2 could only identify the second Applicant.
5. The Applicants were subsequently arraigned before the District Court of Temeke and on 25 February 2004, convicted of armed robbery in accordance with Sections 285 and 286 of the Respondent State’s Penal Code and sentenced to a term of thirty (30) years’ imprisonment.
6. Dissatisfied with the conviction and sentence, the Applicants jointly filed appeals to the High Court and subsequently, to the Court of Appeal, which were dismissed on 21 June 2009 and 14 April 2011, respectively. Then on 19 April 2011, the Applicants filed before the Court of Appeal an application for review of their case, which was also dismissed on 20 March 2015.

### **B. Alleged violations**

7. The Applicants allege that the Respondent State pronounced an “improper” sentence on them and that it also denied them the

right to free legal assistance. The Applicants contend that as a result, the Respondent State has violated their rights protected by the Tanzanian Constitution and Articles 1, 2, 3, 6 and Article 7(1) (c) and (2) of the Charter.

### **III. Summary of the procedure before the Court**

8. The Application was received on 6 July 2015 and served on the Respondent State and the entities listed under Rule 35(3) of the Rules on 23 September 2015 and 19 October 2015, respectively.
9. The Parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.
10. On 24 September 2019, the Court informed the Parties that written pleadings were closed.

### **IV. Prayers of the Parties**

11. The Applicants pray the Court the following:
  - i. a declaration that the Respondent State violated their rights as guaranteed under Article 1,2,3,4,5,6 and 7(1)(c) and (2) of the African Charter;
  - ii. an order compelling the Respondent State to release the Applicants from detention as they have already served the term stipulated in Section 285 and 286 of the penal code. When the robbery was committed on 31 December 2001;
  - iii. an order for reparations should this honourable find merit in the application and in the prayers;
  - iv. an order of this honourable court to supervise the implementation of the court's order..."
12. The Respondent State prays the Court to grant the following orders:
  - i. that the Honourable Court is not vested with jurisdiction to adjudicate the Application;
  - ii. that the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;
  - iii. that the cost of this Application be borne by the Applicants;
  - iv. that the sentence of 30 years imposed by the Respondent State neither contravened the Charter nor its Constitution and thus was lawful;
  - v. that the Respondent State has not violated any of the rights alleged by the Applicants."

## V. Jurisdiction

### 13. Pursuant to Article 3 of the Protocol:

- "1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide".

### 14. In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction ....."

### 15. The Respondent State has raised objections to the material jurisdiction of the Court.

## A. Objections to material jurisdiction

### 16. The Respondent State avers that the Applicants raise two allegations before this Court for the first time asking it to adjudicate on them as a court of first instance, namely, the ones relating to the constitutionality of the sentence, and the right to be represented by Counsel.

### 17. The Applicants assert that the Court is empowered by Article 3(1) of the Protocol to interpret and apply the Charter. Further, the Applicants argue that their Application discloses the violation of rights protected by the Charter and thus, the Court has jurisdiction.

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### 18. The Court, relying on Article 3 of the Protocol, has consistently held that it has material jurisdiction if the Application brought before it raises allegations of violation of human rights; and for it to exercise its jurisdiction, it suffices that the subject of the Application relates to the rights guaranteed by the Charter or any other relevant human rights instrument ratified by the State concerned.<sup>1</sup>

### 19. In the instant case, the Court notes that the Applicants raise allegations of violation of human rights protected under Articles

1 See *Alex Thomas v Tanzania (Merits)* (2015) 1 AfCLR 465 (*Alex Thomas v Tanzania (Merits)*), para 45; *Frank David Omary and others v United Republic*

1, 2, 3, 4, 5, 6 and 7 of the Charter. By virtue of Article 3 of the Protocol, the determination of the said allegations falls within the ambit of the Court's mandate of interpreting and applying the Charter and other international instruments ratified by the Respondent State.

20. Accordingly, the Court has the power to consider and make a determination on the Application.
21. Consequently, the Court dismisses the Respondent State's objection herein and holds that it has material jurisdiction.

## **B. Other aspects of jurisdiction**

22. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and nothing on the record indicates that it lacks such jurisdiction. The Court therefore holds that:
  - i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, which enabled the Applicants to file this Application pursuant to Article 5(3) of the Protocol.
  - ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicants remain convicted on the basis of what they consider as irregularities<sup>2</sup>; and
  - iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.
23. In light of the foregoing, the Court holds that it has jurisdiction to hear the case.

## **VI. Admissibility**

24. In terms of Article 6(2) of the Protocol, "the Court shall rule on the

*of Tanzania* (Admissibility) (2014) 1 AfCLR 358 (*Frank Omary v Tanzania* (Admissibility)), para 115; *Peter Joseph Chacha v Tanzania* (Admissibility) (2014) 1 AfCLR 398, para 114; Application 20/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania* (*Anaclet Paulo v Tanzania* (Merits and Reparations)), para 25; Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations)), para 31; Application 024/15. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania* (*Werema Wangoko v Tanzania* (Merits and Reparations)), para 29.

- 2 See *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (Preliminary Objections) (2013) 1 AfCLR 197, paras 71-77.

admissibility of cases taking into account the provisions of Article 56 of the Charter. "Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of [...] the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules."

- 25.** Rule 40 of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

#### **A. Conditions of admissibility in contention between the Parties**

- 26.** The Respondent State submits that the Application does not comply with two admissibility requirements; namely, exhaustion of local remedies provided for under Rule 40(5) of the Rules and the need for applications to be filed within a reasonable time after exhaustion of local remedies provided for under Rule 40(6) of the Rules.

##### **i. Objection relating to exhaustion of local remedies**

- 27.** The Respondent State, citing the decision of the African Commission on Human and Peoples' Rights (the Commission) of *Southern African Human rights NGO Network and others v Tanzania*, avers that the requirement of exhaustion of local

remedies is an essential principle in international law and that the principle requires a complainant to “utilise all legal remedies” in the domestic courts before seizing an international human rights body like the Court.

28. In this regard, the Respondent State submits that there were legal remedies available to the Applicants which they should have exhausted. The Respondent State contends that it enacted the Basic Rights and Duties Enforcement Act, to provide the procedure for the enforcement of constitutional and basic rights as set out in Section 4 thereof.
29. According to the Respondent State, the rights claimed by the Applicants are provided for under Article 13(6)(a) of the Constitution of Tanzania of 1977, noting that though the Applicants are alleging violations of the various rights under the Constitution; they did not refer the alleged violations to the High Court during the trial as required under Section 9(1) of the Basic Rights and Duties Enforcement Act.
30. The Respondent State submits that the Applicants’ failure to refer the violations of their rights to the High Court or to raise them during the trial, denied it the chance to redress the alleged violations at the domestic level.
31. The Respondent State also reiterates its submission that the Applicants’ allegations are being raised for the first time before this Court and thus it was never given an opportunity to address them in its national courts.
32. The Applicants submit that the principle of exhaustion of local remedies is indeed recognised in international human rights law. Nevertheless, they argue that having been convicted in the District Court, they filed appeals in both the High Court and the Court of Appeal. Moreover, they filed an application for review of the Court of Appeal’s decision before the same Court. It is thus their contention that “all available local remedies were fully exhausted”.
33. Citing the judgment of the Court in the matter of *Alex Thomas v United Republic of Tanzania*, the Applicants state that having seized the Court of Appeal, it would not have been reasonable to require them to file a new human rights case at the High Court, which is a lower court than the Court of Appeal.

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34. The Court notes that pursuant to Rule 40(5) of the Rules, an application filed before the Court shall meet the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* this Court and, as such, aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.<sup>1</sup>
35. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.<sup>2</sup> Furthermore, in several cases involving the Respondent State, the Court has repeatedly stated that the remedies of constitutional petition and review in the Tanzanian judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.<sup>3</sup>
36. In the instant case, the Court observes from the record that the Applicants filed an appeal against their conviction and sentence before the High Court which was dismissed on 21 June 2009 and before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, which upheld the judgments of the High Court and the District Court on 14 April 2011. In addition to pursuing the ordinary judicial remedies, the Applicants have also, albeit unsuccessfully, attempted to use the review procedure at the Court of Appeal. The Respondent State therefore had the opportunity to redress their alleged violations.
37. Regarding those allegations that have been raised before this Court for the first time, namely, the illegality of the sentence imposed on the Applicants and the denial of free legal assistance, the Court observes that the alleged violations occurred in the course of the domestic judicial proceedings. They accordingly form part of the “bundle of rights and guarantees” that were related to or were the basis of their appeals, which the domestic authorities had ample opportunity to redress even though the

1 Application 006/2012. Judgment of 26 May 2017. *African Commission on Human and Peoples' Rights v the Republic of Kenya*, paras 93-94.

2 *Alex Thomas v Tanzania* (Merits), para 64. See also Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95.

3 See *Alex Thomas v Tanzania* (Merits) *op cit* para 65; *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 (*Mohamed Abubakari v Tanzania* (Merits)), paras 66-70; Application 011/2015. Judgment of 28 September 2017 (Merits) *Christopher Jonas v Tanzania* ((*Christopher Jonas v Tanzania* (Merits))), para 44.

Applicants did not raise them explicitly.<sup>4</sup> It would be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.<sup>5</sup> The Applicants should thus be deemed to have exhausted local remedies with respect to these allegations.

38. In light of the foregoing, the Court dismisses the Respondent State's objection relating to the requirement of exhaustion of local remedies.

**ii. Objection relating to failure to file the Application within a reasonable time**

39. The Respondent State contends that the Applicants have not complied with the requirement under Rule 40(6) of the Rules that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It asserts that the Applicants' case at the national courts was concluded on 14 April 2011, and it took four (4) years and three (3) months for the Applicants to file their case before this Court.
40. The Respondent State draws this Court's attention to the fact that, even though Rule 40(6) of the Rules does not prescribe the time limit within which individuals are required to file an application, the Commission in *Michael Majuru v Zimbabwe* (2008) as well as the Inter-American Court of Human Rights and European Court of Human Rights have held a period of six (6) months to be a reasonable time.
41. The Respondent State further avers that the Applicants have not referred to any impediments which caused them not to lodge the Application within six (6) months, and for these reasons, submits that the Application should be declared inadmissible.
42. In their Reply, the Applicants argue that the review of the decision of the Court of Appeal was dismissed on 20 March 2015, that is, three (3) months and six (6) days before filing the Application before this Court.
43. Citing the Court's jurisprudence in *Peter Joseph Chacha v United Republic of Tanzania* and *Christopher Mtikila v the United Republic of Tanzania*, the Applicants contend that the Court rejected the six (6) months period that the Respondent State considers to be

4 Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi and Another v United Republic of Tanzania*, (*Kennedy Owino Onyachi and Another v Tanzania* (Merits)), para 54.

5 *Alex Thomas v Tanzania* (Merits), *op cit*, paras 60-65, *Kennedy Owino Onyachi and Another v Tanzania*, para 54.

the standard for reasonable time in international human rights jurisprudence.

44. The Applicants also cited the matter of *Norbert Zongo v Burkina Faso* in support of their contention that reasonable time should be considered on a case by case basis. In this regard, they aver that the Court should take their being lay, incarcerated, and having not benefitted from legal aid services in the national courts as factors in their favour when deciding on whether the Application has been filed within a reasonable time.

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45. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply states: “a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter.” The Court recalls its established jurisprudence that: “...the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis.”<sup>6</sup>
46. The records before this Court show that local remedies were exhausted on 14 April 2011, when the Court of Appeal delivered its judgment. In principle, this should be the date from which reasonable time limit as envisaged under Rule 40(6) of the Rules and Article 56 (6) of the Charter, should be reckoned.
47. In the instant case, the Application was filed before this Court on 6 July 2015, that is, four (4) years, two (2) months and twenty three (23) days after exhaustion of local remedies. The key question for determination is whether such delay of four years and two months is, in the circumstances of the case, reasonable in terms of Rule

6 See *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (Merits) (2014) 1 AfCLR 219, para 121; Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations) *Kenedy Ivan v United Republic of Tanzania (Kenedy Ivan v Tanzania (Merits and Reparations))* para 51; Application 056/2016. Judgment of 7 December 2018 (Merits) *Oscar Josiah v United Republic of Tanzania (Oscar Josiah v Tanzania (Merits))*, para 24; Judgment of 28 March 2019 (Merits and Reparations). *Lucien Ikili Rashidi v United Republic Tanzania (Lucien Ikili Rashidi v Tanzania (Merits and Reparations))*, para 54.

40 (6) of the Rules.

48. The Court notes from the file that the Applicants, following the dismissal of their appeal by the same, filed an application for review before the Court of Appeal on 19 April 2011, which was dismissed on 20 March 2015. The Court observes that the Applicants pursued the review procedure even though it was an extraordinary remedy.
49. In the opinion of this Court, the fact that the Applicants attempted to exhaust the review procedure should not be used to their detriment and should accordingly be taken as a factor in the determination of reasonable time limit in Rule 40 (6) of the Rules.<sup>7</sup> In this regard, the Court takes note that the Applicants filed their Application before this Court three (3) months after the dismissal of their application for review at the Court of Appeal on 20 March 2015.
50. In addition, the Court notes that the Applicants are lay, incarcerated, and without the benefit of free legal assistance.
51. Given the above circumstances, the Court considers that the delay of four years, two (2) months and twenty three (23) days taken to file the Application before this Court, after the judgment of the Court of Appeal, is reasonable in terms of Rule 40 (6) of the Rules and Article 56 (6) of the Charter.
52. Accordingly, the Court dismisses the objection of the Respondent State relating to the non-compliance of the Applicants with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

## **B. Conditions of admissibility not in contention between the Parties**

53. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 40, Sub-rules 1, 2, 3, 4 and 7 of the Rules on, the identity of Applicants, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been

<sup>7</sup> See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (Armand Guehi v Tanzania (Merits and Reparations))*, para 56; Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania (Werema Wangoko v Tanzania (Merits and Reparations))*, para 49.

complied with.

54. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

## **VII. Merits**

55. The Applicants allege the violations of Articles 1,2,3,4,5,6,7 and 9 of the Charter. The Court notes however that the Applicants' grievances can be categorised into three allegations, falling under the right to a fair trial in Article 7 of the Charter, namely:
- a. Illegal conviction and sentence imposed against the Applicants;
  - c. The failure to provide the Applicants with free legal assistance;
  - d. Denial of right to information.

### **A. Allegation relating to the legality of the conviction and sentence**

56. The Applicants allege that they were indicted and convicted for robbery with violence pursuant to Sections 285 and 286 of the Penal Code which they aver provides for a punishment of fifteen (15) years imprisonment.
57. According to the Applicants, the Respondent State's argument that Section 285 and 286 of the Penal Code should be read together with Section 5(b) of the Minimum Sentencing Act "is devoid and wants merits."*(sic)*
58. It is the view of the Applicants that the Penal Code which establishes the offence for robbery with violence provides for a lesser sentence than the Minimum Sentencing Act which provides for the thirty (30) years' imprisonment and that the Penal Code's provision as the foundation of the offence, supersedes the Minimum Sentencing Act. The Applicants thus submit that the national courts erred in sentencing them to a term of thirty (30) years' imprisonment.
59. The Respondent State refutes all the allegations raised by the Applicants, noting that a term of thirty (30) years' imprisonment is the applicable sentence for robbery with violence pursuant to Section 285 and 286 of the Penal Code as read together with Section 5(b) of the Minimum Sentences Act 1972 as amended by Act No. 10 of 1989 and Act No. 6 of 1994.
60. It is the Respondent State's contention that Section 5(b) (ii) of the Minimum Section Act is applicable to "all robberies in which the offender was armed with a dangerous weapon or instrument" or was in the company of one or more persons and caused personal

violence in the act of the robbery.

61. The Respondent State avers that the facts of this case fit perfectly in the scenario envisaged under the Minimum Sentencing Act and thus, the Applicants' allegations are groundless and should be dismissed.

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62. Article 7(2) of the Charter provides:  
"No one may be condemned for an act of omission, which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."
63. The Court notes that Article 7(2) of the Charter encapsulates the principle of legality, which among other things, proscribes the imposition of a criminal punishment except when this is prescribed by a law in force at the time of the commission of a criminalised act entailing such punishment.
64. In the instant case, the relevant question for determination is whether the thirty (30) years' penalty to which the Applicants were sentenced was provided in the laws of the Respondent State at the time the offence of which they were convicted was committed.
65. The records before this Court indicate that the incident that led to the arrest of the Applicants happened on 31 December 2001. Following their arrest, the Applicants were subsequently charged and convicted of robbery with violence pursuant to Sections 285 and 286 of the Penal Code as amended by Act No. 10 of 1989.
66. The Court notes that the penalty for robbery with violence carries a similar punishment as armed robbery in the laws of the Respondent State, which according to Section 5 (b) of the Minimum Sentences Act of 1972, as amended by the 1994 Written Laws Amendment, is a minimum of thirty (30) years' imprisonment. The Court has affirmed this in *Mohamed Abubakari v United Republic of Tanzania*<sup>8</sup> and *Christopher Jonas v United Republic of Tanzania*, where it stated that "thirty years has been in the United Republic of Tanzania, the minimum punishment

8 *Mohamed Abubakari v Tanzania* (Merits) para 210.

applicable for the offence of armed robbery since 1994”.<sup>9</sup>

67. It follows that the Applicants were convicted on the basis of legislation which was in force on the date of commission of the crime, that is, 31 December 2001, and the punishment imposed on them was also prescribed in a law which was enacted prior to the commission of the crime, that is, the Minimum Sentences Act 1972 as amended by Act No. 10 of 1989 and Act No. 6 of 1994.
68. The Applicants’ allegation that their conviction and punishment violates the Charter thus lacks merit.
69. The Court therefore finds that there was no violation of Article 7(2) of the Charter.

**B. Allegation relating to failure to provide the Applicants with free legal assistance**

70. The Applicants contend that they were not provided with free legal representation throughout their trials at the domestic court even though this is required by the International Convention on Civil and Political Rights under Article 14(3) thereof and under Article 7(1)(c) of the Charter.
71. Citing the judgment of the Court in *Alex Thomas v United Republic of Tanzania* and *Thomas Miengi v Republic* decided by the High Court of Tanzania, the Applicants argue that they were charged and convicted of “a very serious offence” which carries a “serious punishment of imprisonment”, and the trials were very technical requiring legal knowledge and skills. In addition, the Applicants indicate that they did not have the financial means to hire their own lawyers while the Respondent State had the benefit of the representation of various state attorneys. According to the Applicants all these circumstances justified the provision of free legal assistance and the failure of the Respondent State to do so disadvantaged them and violated their right to a fair trial.
72. The Respondent State refutes the allegation of the Applicants and submits that the Applicants should be put to strict proof. It argues that the right of legal assistance is not mandatory in its domestic laws and that the provision of legal aid is contingent on the accused person not having the means to afford Counsel and only if the interests of justice so require.
73. Further, the Respondent State avers that the fact that the Applicants were unrepresented does not imply that they were disadvantaged in any way. In this vein, it contends that the

9 *Christopher Jonas v Tanzania* (Merits) para 85.

Applicants' right to defence was guaranteed before the District Court and the appellate courts. Citing its Criminal Procedure Act [2002], the Respondent State submits that in its jurisdiction, evidence must be taken in the presence of the accused to ensure that the accused is well informed at the stage of defence.

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- 74.** Article 7(1)(c) of the Charter provides:  
“Every individual shall have the right to have his cause heard. This comprises:  
[...]  
c. The right to defence, including the right to be defended by counsel of his choice.”
- 75.** The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),<sup>10</sup> and determined that the right to defence includes the right to be provided with free legal assistance.<sup>11</sup>
- 76.** The Court further notes that in the present Application, the Applicants were not afforded free legal assistance throughout the trial and appeal proceedings in the national courts. This is not disputed by the Respondent State, which simply contends that the provision of free legal assistance is not automatic but depends on its and the Applicants' economic capacity.
- 77.** On several occasions, the Court has however held that an individual charged with a criminal offence is entitled to the right to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.<sup>12</sup>

10 The Respondent State became a State Party to ICCPR on 11 June 1976.

11 *Alex Thomas v Tanzania* (Merits), para 114; Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v Tanzania* (*Kijiji Isiaga v Tanzania* (Merits)), para 72; *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 104.

12 *Alex Thomas v Tanzania* (Merits), para 123. See also *Mohammed Abubakari v Tanzania* (Merits), paras 138-139.

78. In the instant case, the Applicants were charged with a serious offence, that is, robbery with violence, carrying a severe punishment, a minimum punishment of thirty (30) years' imprisonment. In addition, the Respondent State has not adduced any evidence to challenge the contention that the Applicants were lay and indigent, without legal knowledge and technical legal skills to properly defend their case in the course of their trial and appellate proceedings. In these circumstances, the Court is of the view that the interests of justice warranted that the Applicants should have been provided with free legal assistance.
79. The Court takes note of the Respondent State's contention that the Applicants were not in any way disadvantaged for having not been given legal assistance, as they were able to defend themselves. However, the Court observes that the Applicants do not need to show that the non-provision of legal assistance occasioned some disadvantage to them in the course of their trial and appeals at the District Court and appellate courts. In so far as the interests of justice required the provision of free legal assistance and the Respondent State had failed to afford one, its responsibility would be engaged.
80. The Court further underscores that the Respondent State's citation of its domestic laws requiring the provision of legal assistance is not sufficient to demonstrate that the Applicants have in fact got the benefit of free legal assistance. The Respondent State's contention in this regard thus lacks merit.
81. In view the above, the Court finds that the Respondent State has violated Article 7(1)(c) of the Charter.

### **C. Allegation relating to denial of right to information**

82. According to the Applicants, the failure to be informed about their rights in the trial amounts to the denial of the right to information. The Applicants argue that they were not informed of their right to legal representation or fair trial by the national courts.
83. The Applicants further argue that the national courts have a duty to inform an accused person of all their rights at the beginning of the trial and they cited *Thomas Miengi v Republic*, decided by the High Court of Tanzania.

- 84.** The Respondent State contends that the allegation is baseless and the Applicants have not demonstrated how they were denied the right to information.

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- 85.** The Court notes that, the Applicants allege the violation of their right to information as a result of the Respondent State's failure to inform them of their right to legal representation. The Court is of the view that the substance of the Applicants' allegation relates more to the right to a fair trial, specifically, the right to be informed of one's right to Counsel than to the right to information and will deal with it accordingly.
- 86.** The Court observes that although Article 7 of the Charter does not expressly provide for the right to be informed of one's right to Counsel, Article 14(3)(d) of the International Covenant for Civil and Political Rights (ICCPR)<sup>13</sup> require that in criminal cases, any accused shall be informed of his right to legal representation. As repeatedly affirmed by the European Court of Human Rights, the right to be informed of one's right to a lawyer is critical to the respect for one's right to defence and authorities owe a positive obligation to proactively inform accused individuals of their right to legal representation at the earliest time.<sup>14</sup>
- 87.** In the instant case, the Respondent State does not dispute the Applicants' allegation that they were not informed of their right to Counsel at the time or prior to their trial, but simply argues that their contention is baseless. The Court also found nothing on the record showing that this was done by the authorities of the Respondent State. Nor are there any justifications provided by the Respondent State as to why the Applicants were not informed of their right to have Counsel of their choice. Evidently, this constrained the Applicants' capacity to defend themselves.
- 88.** In view of the above, the Court therefore finds that the failure of the Respondent State to inform the Applicants of their right to legal representation violated Article 7(1)(c) of the Charter as read

13 The Respondent State became a Party to ICCPR on 11 June 1976.

14 See for example, *Panovits v Cyprus*, Application 4268/04, Judgment of 11 December 2008, paras 72-75, *Padalov v Bulgaria*, Application 54784/00, 10 August 2006, para 61.

together with Article 14(3)(d) of ICCPR.

## VIII. Reparations

89. The Applicants pray the Court to find a violation of their rights, set them free and make an order for reparations and for supervision of implementation.
90. On the other hand, the Respondent State prays the Court to find that it has not violated any of the rights of the Applicants and to dismiss the Application.

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91. Article 27(1) of the Protocol provides that “if the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

### A. Pecuniary Reparations

92. The Court notes its finding above that the Respondent State has violated the Applicants’ right to a fair trial by failing to provide free legal assistance and the right to be informed of the right to Counsel in the course of the criminal proceedings against them. In this regard, the Court recalls its position on State responsibility that “any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation”.<sup>15</sup>
93. The Court has established in its jurisprudence that moral prejudice is presumed in the case of a violation of human rights and the quantification of the damages in this regard must be equitable taking into account the circumstances of the case.<sup>16</sup> The Court has adopted the practice of granting a lump sum in such

15 See *Reverend Christopher R Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72 para 27 and Application 010/2015. Judgment of 11 May 2018, *Amiri Ramadhani v The United Republic of Tanzania* (Merits), para 83.

16 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina Faso* (reparations) (2015) 1 AfCLR 258, para 55.

circumstances.<sup>17</sup>

94. The Court notes that the violations it has found in the instant case caused moral prejudice to the Applicants. The fact that they were not informed of their right to Counsel and that they did not get legal assistance in the course of their trial at the District Court and appellate courts evidently caused them some moral damage as a result of their lack of knowledge of court procedures and technical legal skills to defend themselves.
95. The Court therefore, in exercising its discretion, awards each Applicant an amount of Tanzania Shillings Three Hundred Thousand (TZS300,000) as fair compensation.<sup>18</sup>

## **B. Non-Pecuniary Reparations**

96. Regarding the application for an order of release prayed by the Applicants, the Court has stated that it can be ordered only in specific and compelling circumstances.<sup>19</sup> Examples of such circumstances include “if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant’s arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice.”<sup>20</sup>
97. In the instant case, the Court established that the Respondent State has violated the Applicants’ right to a fair trial relating to their right to be informed of their right legal representation and their right to free legal assistance contrary to Article 7 (1) (c) of the Charter as read together with Article 14 (3) (d) of the ICCPR. Without minimising the seriousness of these violations, it is the Court’s opinion that the nature of the violations in the particular contexts of this case does not reveal any circumstance which would make their continued imprisonment a miscarriage of justice or arbitrary. Nor have the Applicants demonstrated the existence

17 *Lucien Ikili Rashidi v Tanzania*. Judgment (Merits and Reparations) *op cit*, para 119.

18 See *Anaclet Paulo v Tanzania* (Merits and Reparations), para 107; Application 027/2015. Judgment of 21 September 18 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania* (*Minani Evarist v Tanzania* (Merits and Reparations)), para 85.

19 *Alex Thomas v Tanzania* (Merits) *op. cit*, para 157; Application 016/216. Judgment of 21 September 2018 (Merits and Reparations), *Diocles William v United Republic of Tanzania*, para 101; *Minani Evarist v Tanzania* (Merits and Reparations), para 82; Application 006/2016. Judgment of 7 December 2018 (Merits), *Mgosi Mwita v United Republic of Tanzania*, para 84; *Kijiji Isiaga v Tanzania* (Merits), para 96; *Armand Guehi v Tanzania* (Merits and Reparations), para 164.

20 *Minani Evarist v Tanzania* (Merits and Reparations), para 82.

of other specific or compelling reasons to warrant an order for release.

98. Accordingly, the Court rejects the Applicant's request to be released from prison.

## IX. Costs

99. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."
100. In their submissions, both Parties prayed the Court to order the other to pay costs.
101. Based on the foregoing, the Court rules that each Party shall bear its own costs.

## X. Operative Part

102. For these reasons,  
The Court

*Unanimously,  
On jurisdiction*

- i. *Dismisses* the objections to its material jurisdiction;
- ii. *Declares* that it has jurisdiction.

*On admissibility*

- iii. *Dismisses* the objections on admissibility;
- iv. *Declares* the Application admissible.

*On merits*

- v. *Finds* that the Respondent State has not violated Article 7(2) of the Charter as regards the sentence imposed on the Applicants;
- vi. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter in relation to the right of the Applicants to be informed of their right to Counsel and the lack of provision of free legal assistance to them.

*On reparations*

*Pecuniary reparations*

- vii. *Orders* the Respondent State to pay the Applicants the sum of Tanzania Shillings Three Hundred Thousand (TZS300, 000) each, free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully

paid.

- viii. *Orders* the Respondent State to submit a report to it within six (6) months of the date of notification of this judgment on measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*Non-pecuniary reparations*

- ix. *Dismisses* the Applicants' prayer for release from prison.

*On costs*

- x. *Orders* each Party to bear its own costs.

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### **Separate opinion: BENSAOULA**

1. I share the opinion of the majority of the Judges regarding admissibility of the Application, jurisdiction of the Court and the Operative Part.
2. However, I do not share the grounds on which the Court examined:
  - Admissibility of the Application in relation to the objection by the Respondent State on exhaustion of local remedies concerning the Applicants' claims raised for the first time before the Court, namely, the illegality of the sentence inflicted on them;
  - And the objection in respect of reasonable time.
  - As regards the grounds for admissibility of the Application in relation to the objection raised by the Respondent State on exhaustion of local remedies concerning the Applicants' claims raised for the first time before the Court, namely, the illegality of the sentence imposed on them, the said grounds run counter to:
    - **The tenets of the obligation to exhaust local remedies before referral to the Court**
3. It is common knowledge that, in many of its judgments, the Court restated the conclusions of the African Commission on Human

and Peoples' Rights<sup>1</sup> according to which the condition set out in Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 on exhaustion of local remedies "*reinforces and maintains the primacy of the domestic system in the protection of human rights vis-à-vis the Court*". As such, the Commission aims at providing States the opportunity of addressing the human rights violations committed in their territories before an international human rights body is called upon to determine the States' responsibility in such violations.

4. It is however apparent from the judgment under reference in this Separate Opinion that the Court appropriated the theory of "*bundle of rights*" to dispose of certain requirements of the obligation to exhaust local remedies.
5. Yet, the tenets of this theory show that it was created and used in matters of property rights, because often among economists, such rights were the same as private property rights. The demonstration that flows from the theory has, above all, caused common ownership to evolve by highlighting the dismemberments of property, and hence its application in matters of the rights of indigenous peoples.
6. It emerges from the Respondent State's objections that the latter criticizes the Applicants for having failed to present certain claims before the domestic court prior to bringing the same to this Court for the first time, thereby disregarding the requirement of exhaustion of local remedies. This is also true for their allegations that the thirty (30) years sentence imposed on them was unconstitutional and inappropriate, and that they were not afforded legal assistance.
7. In response to these allegations, the Court upheld its jurisprudence on constitutionality petition,<sup>2</sup> held that the local remedies concerned only ordinary remedies, and that in the present case, the Applicants had exhausted the said remedies.
8. The Court further stated that legal assistance is a fundamental right of the Applicants prosecuted for a crime and liable to be sentenced to a heavy penalty and, therefore, that the Court of Appeal should have discussed the issue even though the

1 Application N006/2012. Judgment of 26 May 2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 93; Application 005/2013, *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015; Application 001/2015. Judgment of 7 December 2018, *Armand Guéhi v United Republic of Tanzania*.

2 Para 35 of the Judgment.

Applicant had not raised it.<sup>3</sup>

9. With regard to the allegation that the thirty (30) years sentence was inappropriate, the Court “*observes that the alleged violations of the rights of the Applicants occurred in the course of domestic proceedings which led to the finding of guilt and to the sentence pronounced against him. The allegations raised by the Applicant therefore form part of the bundle of rights and guarantees that were related to or were the basis of their appeals...*”<sup>4</sup>
10. In many of its judgments, the Court has relied on this “bundle of rights” theory to dispose of certain claims brought before it in matters of exhaustion of local remedies.<sup>5</sup>
11. In my opinion, applying this theory in matters of local remedies amounts to distorting its very basis and tenets. The Applicants’ rights are diverse and different in nature and the allegations thereto related, if in the Charter, can be incorporated into a set of rights such as the right to information, freedom of expression, fair trial ...
12. At domestic level, all laws whatever the nature, spell out the scope of and the rules governing each right, and it lies with the national judge to consider certain rights as part of a bundle of rights and to adjudicate them as such.
13. In defining the aforesaid bundle of rights in relation to the national judge, the Court ignored the powers and prerogatives of judges in general and, more restrictively, in matters of appeal, especially as the Applicants have at no time responded to the Respondent State’s allegation by proving that the appellate judges have the power to do so – since the national texts confer the said powers and prerogatives on them – but that they could consider requests brought, for the first time, before the African Court as part of a bundle of rights.

• **The prerogatives and jurisdiction of appellate judges before national courts**

14. It is an established fact that “appeal proceedings” are of two types:
  - Appeal that has devolutive effect, and
  - Appeal that is limited to specific points of the judgment.

3 Para 37 of the Judgment.

4 Para 44 of the Judgment.

5 Application 005/2013. *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November; Application 006/2015. *Nguza Viking and Johnson Nguza v United Republic of Tanzania*, Judgment of 23 March 2018; Application 003/2015. *Kennedy Owino Onyachi v United Republic of Tanzania*, Judgment of 28 September 2017.

- Whereas the devolutive effect of an appeal means that the Court of Appeal has full and total knowledge of the litigation and must adjudicate in fact and in law with the same powers as the trial judge, the devolution occurs only where the appeal relates to all the provisions of the first judgment.
  - The extent of the devolutive effect of the appeal will thus be determined by two procedural acts, that is, the statement of appeal or the notice of appeal that will not only limit the applicant's claims, but also the submissions of the parties which may contain new claims not mentioned in the notice of appeal.
  - Limited appeal, for its part, means that the appeal is confined to specific points in the judgment.
15. Where the judge makes a ruling outside these two types of appeal and adjudicates on claims that have not been expressed, he/she will have ruled *ultra petita*, which will generate effects as regards appreciation of the decision.
  16. With respect to the allegation that the 30-year sentence was inappropriate, the Court declared *"that the alleged violations of the rights of the Applicants occurred in the course of domestic proceedings which led to the finding of guilt and to the sentence pronounced against them. The allegations raised by the Applicant therefore is part of the bundle of rights and guarantees that were related to or were the basis of their appeals. It follows that the domestic courts have had ample opportunity to address these allegations, even without the Applicants having to raise them"*.<sup>6</sup>
  17. The Court's conclusion as regards local remedies in relation to claims which have not been subjected to such remedies touches deeply on the prerogatives of the appellate courts and the scope of their jurisdiction over the case brought before them after the appeal and also on the purpose of imposing the exhaustion of domestic remedies on the Applicants as a right of Respondent States to review their decisions and thus avoid being arraigned before international bodies.
  18. In my opinion: The Court should have consulted the domestic texts which govern the procedure and the jurisdiction of appellate judges in criminal matters, rather than rely on the elastic concept of bundle of rights which will time and again give it the power to examine and adjudicate claims that have not been subjected to domestic remedies, and thus minimize the importance of such

remedies in referrals to the Court.

19. In my view, this runs counter to the tenets of the obligation to exhaust domestic remedies and to the rights of States in this regard.

• **As for the objection regarding reasonable time, application of this concept by the Court runs counter to the very essence of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules**

20. It is apparent from the Judgment under reference in this Separate Opinion<sup>7</sup> that although the Court declared the local remedies as having been exhausted on 14 April 2011, and thus that as at the date of filing of the Application, that is 6 July 2015, four (4) years, two (2) months and twenty-three (23) days had elapsed, the Court, in its deliberation and decision on the filing of the Application within reasonable time, held in conclusion that this period remains reasonable due to the fact that the Application was filed on 6 July 2015, three (3) months after the Applicants' application for review was dismissed by judgment of 20 March 2015.<sup>8</sup>

21. The Court pointed out, moreover, that the Applicants are lay incarcerated persons, and did not have the benefit of assistance by counsel, while noting the fact that they had filed for a review – an extraordinary remedy – and that they were not to blame for having awaited a decision in this regard.

22. Whereas it is apparent from Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 that the Application must be filed after the exhaustion of local remedies, paragraphs 6 of these same Articles confer on the Court the prerogative to determine whether the time limit for filing the Application is reasonable after the local remedies have been exhausted or the date that it would have set as being the commencement of the time limit for its own referral.

23. In the present case, the Court, having taken into account the facts which occurred after the ordinary remedies were exhausted, namely, the review application, to justify the period of four (4) years, two (2) months and three (3) days, could simply have retained the date of the judgment rendered after the application for review. This falls within the very logic of the prerogatives

7 Para 36 of the Judgment.

8 Para 49 of the Judgment.

conferred on it by the legislator in the second part of paragraph 6 of the above-mentioned Articles and would actually have led to a reasonable referral time of three (3) months and six (6) days.

- 24.** This would have been even more pertinent, as the Court proffered as grounds for this lengthy time frame the fact that the Applicants were laymen in prison and did not have the benefit of legal assistance<sup>9</sup> – information not proven given that before this Court the Applicants did not need lawyers to defend themselves.

9 Para 50 of the Judgment.